Taipan Focus Sdn Bhd v Tunku Mudzaffar b Tunku Mustapha

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)-17 OF 2008(B)
ARIFIN ZAKARIA CJ (MALAYA), MOHD GHAZALI AND RAUS SHARIF FCJJ
17 JUNE 2010

Civil Procedure — Jurisdiction — Court of Appeal — Interim preservation of property — Whether court seized with jurisdiction to direct registrar to enter registrar's caveat and restrain appellant from disposing land pending appeal — Whether jurisdiction original jurisdiction of court — Whether court wrongly invoked s 44 of the Courts of Judicature Act 1964 to order entry of registrar's caveat — Courts of Judicature Act 1964 s 44

Land Law — Restraint on dealings — Caveats — Private caveat — Interim extension of private caveat pending hearing of appeal — Whether court had power to extend private caveat beyond six year life span — Registrar's caveat — Whether court had power to direct registrar to enter registrar's caveat — Whether requirements for making of caveat satisfied — Whether there must be final judgment or order before Court of Appeal could direct registrar to enter registrar's caveat — Whether Court of Appeal wrongly invoked s 44 of the Courts of Judicature Act 1964 to order entry of registrar's caveat — National Land Code ss 319, 320, 321 & 417

The subject matter of the dispute in the present case was a piece of land situated in Petaling Jaya Selangor ('the land'), which was owned by Harta Sekata Sdn Bhd ('HSSB'), a locally incorporated company. On 30 March 1998 HSSB entered into a deed of settlement (the deed of settlement) with one Soo Sin Lian @ Su Ken Sin ('Peter Soo') and also executed a power of attorney ('POA') in favour of Peter Soo in respect of the land. Under this POA, the donee, Peter Soo, had, inter alia, the power to sell and dispose of the land at a fair market value and to enter into vacant possession of the land. On 10 October 1988, purportedly exercising his powers under the deed of settlement and POA, Peter Soo entered into a sale and purchase agreement ('SPA') to sell the land to the appellant for a purchase price of RM23m. Consequently on 15 October 1998, the respondent, a director of HSSB, lodged a private caveat on the land ('the private caveat') to restrain any dealing on the land. On 20 November 1998, HSSB filed a civil suit in the KL High Court ('the KL suit') against the appellant and Peter Soo challenging the validity of the deed of settlement and POA. In the KL suit, HSSB prayed, inter alia, for a declaration and order that the POA was voidable and/or unenforceable; a declaration and order that the

deed of settlement was void and/or unenforceable; and a declaration and order that the SPA was void and/or unenforceable. Thereafter on 16 September 1999, the appellant filed a civil suit in the Shah Alam High Court ('the Shah Alam suit') against Peter Soo and HSSB praying for, inter alia, specific performance of the SPA and the removal of the respondent's private caveat. On 31 October 2000, Peter Soo purporting to act on behalf of HSSB and the appellant, entered into a consent order in the Shah Alam suit, which provided, inter alia, that the land be transferred to the appellant and the respondent's private caveat be removed. Consequently, the respondent intervened in the Shah Alam suit and applied to set aside that part of the consent order which related to the removal of the respondent's private caveat. HSSB also applied to set aside the consent order and both HSSB and the respondent averred that the consent order was entered into without their knowledge. When the High Court judge in Shah Alam dismissed the respondent's application to set aside the consent order removing his private caveat, the respondent appealed to the Court of Appeal ('the CA'). The CA allowed the respondent's appeal, which reinstated the respondent's private caveat. On 8 November 2004, the respondent filed an ex parte motion in the Shah Alam High Court to extend his private caveat. Although the High Court extended the private caveat, after an inter partes hearing on 20 June 2007, the respondent's application to extend the private caveat was dismissed. Aggrieved the respondent appealed to the CA against that decision. While the appeal was still pending, the respondent filed a motion pursuant to s 44 of the Courts of Judicature Act 1964 ('the CJA') before the CA for an interim extension of the private caveat pending the hearing of the appeal, and further or other relief as the court deemed fit. On 9 January 2008, the CA held that it had no power to extend the private caveat beyond the statutory period of 6 years as it would be contrary to s 328 of the National Land Code ('the NLC') but it was prepared to consider granting an order for a registrar's caveat and an order for an injunction restraining the appellant from dealing with or disposing of the land pending the outcome of the KL suit, notwithstanding that the same was not prayed for in the motion. The appellant obtained leave to appeal against that decision. In this appeal the appellant submitted that the orders granted by the CA were not in terms of the motion, in that the interim order prayed for by the respondent was solely to preserve and extend the respondent's private caveat until the disposal of the appeal in the CA. The appellant thus submitted that the CA had wrongly invoked s 44 of the CJA to order the entry of a registrar's caveat and to order the injunction order against the appellant. The respondent submitted that the CA was right in invoking s 44 of the CJA to prevent prejudice to the claims of the parties as well as to preserve the land until the outcome of the dispute.

Held, allowing the appeal with costs here and court below:

(1) (per **Arifin Zakaria CJ (Malaya)** and **Raus Sharif FCJ**) Under s 328 of the NLC, the life span of a private caveat is six years and in this case, when

the respondent applied to extend his private caveat, it had already been extended up to six years. The court had no power to extend a private caveat beyond the six year life span, which was a statutory provision. Although the court had the power to direct the registrar to enter a registrar's caveat under s 417 of the NLC, the CA was indirectly extending the respondent's private caveat to beyond six years, which was prohibited by s 328 of the NLC. Further the court could only give directions to the registrar if such directions were necessary to give effect to any judgment or order of the court. However, in the present case there was no final order or judgment for the CA to give effect to and the procedure as laid down in ss 319, 320, 321 and 417 of the NLC was not followed. As such the order of the CA that the registrar's caveat be entered could not be supported (see paras 58–61).

(2) (per **Arifin Zakaria CJ (Malaya)** and **Raus Sharif FCJ**) Although s 44 of the CJA confers power upon the CA to make any interim order to prevent prejudice to the claims of parties pending the hearing of the 'proceeding'. The word 'proceeding' must refer to the appeal pending before the CA, and the subject matter of the appeal pending before the CA in this case was the extension of the respondent's private caveat. Thus, once the CA found that the respondent's private caveat could not be extended the matter should have ended there. The orders that a registrar's caveat be entered on the said land as well as an injunction restraining the appellant from dealing with or disposing of the land should not have been made, because the orders were in effect giving the respondent what he wanted without his appeal against the High Court decision being heard. This was a clear miscarriage of justice and s 44 of the CJA could not be invoked to grant those orders (see paras 61–62).

(3) (per **Mohd Ghazali FCJ,** dissenting) The respondent's application for an interim extension of the private caveat pending the hearing of the appeal also asked for 'such further or other relief or other order as the court deems fit' so the CA was clearly entitled to act on that prayer. The CA had correctly exercised its power provided under s 44 of the CJA in granting the said orders as that power had conferred original jurisdiction on the CA. The court had the originating jurisdiction to make an order directing the registrar to enter a registrar's caveat under s 417 of the NLC. If the respondent and HSSB were to succeed at the trial of the KL suit, there was a possibility that they would not be able to get back the land. Thus on the balance of convenience, the order under s 417 of the NLC was properly made under the circumstances of the case. The injunction order restraining the appellant from dealing with the land should also remain with the usual undertaking as to damages (see paras 31, 33, 39 & 40–41).

[Bahasa Malaysia summary

Hal perkara dalam pertikaian kes ini merupakan sebidang tanah yang terletak di Petaling Jaya, Selangor, ('tanah tersebut'), yang dimiliki oleh Harta Sekata

Sdn Bhd ('HSSB'), syarikat tempatan. Pada 30 Mac 1998 HSSB menandatangani surat ikatan penyelesaian ('surat ikatan penyelesaian') dengan Soo Sin Lian @ Su Ken Sin ('Peter Soo') dan juga menyempurnakan surat kuasa wakil bagi pihak Peter Soo berkaitan tanah tersebut. Di bawah surat kuasa wakil tersebut, penerima, Peter Soo, antara lain, mempunyai kuasa untuk menjual dan menguruskan tanah tersebut pada harga pasaran yang wajar dan milikan kosong tanah tersebut. Pada 10 Oktober 1988, menjalankan kuasanya di bawah surat ikatan penyelesaian dan surat kuasa wakil, Peter Soo menandatangani perjanjian jual beli ('PJB') untuk menjual tanah tersebut kepada perayu dengan harga belian RM23 juta. Kemudiannya pada 15 Oktober 1998, responden, pengarah HSSB, memasukkan kaveat persendirian ke atas tanah tersebut ('kaveat persendirian') untuk menghalang apa-apa urusan terhadap tanah tersebut. Pada 20 November 1998, HSSB memfailkan guaman sivil di Mahkamah Tinggi KL ('guaman KL') terhadap perayu dan Peter Soo mempertikaikan kesahan surat ikatan penyelesaian dan surat kuasa wakil tersebut. Dalam guaman KL, HSSB memohon, antara lain, untuk perisytiharan dan perintah bahawa surat kuasa wakil itu tak sah dan/atau tidak boleh laksana; perisytiharan dan perintah bahawa PJB tak sah dan/atau tidak boleh laksana. Selepas itu pada 16 September 1999, perayu memfailkan suatu guaman sivil di Mahkamah Tinggi Shah Alam ('guaman Shah Alam') terhadap Peter Soo dan HSSB, memohon, antara lain, pelaksanaan spesifik PJB dan pemotongan kaveat persendirian responden. Pada 30 Oktober 2000, Peter Soo yang bertindak bagi pihak HSSB dan perayu, menandatangani perintah persetujuan dalam guaman Shah Alam, yang memperuntukkan, antara lain, bahawa tanah tersebut dipindah milik kepada perayu dan kaveat persendirian responden dipotong. Kemudian, responden mencelah dalam guaman Shah Alam dan memohon untuk mengenepikan sebahagian perintah persetujuan yang berkaitan dengan pemotongan kaveat persendirian responden. HSSB juga memohon untuk mengenepikan perintah persetujuan tersebut dan HSSB dan responden menegaskan bahawa perintah persetujuan tersebut dimasukkan tanpa pengetahuan mereka. Apabila Mahkamah Tinggi Shah Alam menolak permohonan responden untuk mengenepikan perintah persetujuan memotong kaveat persendiriannya, responden merayu ke Mahkamah Rayuan ('MR'). MR membenarkan rayuan responden, yang memasukkan semula kaveat persendirian responden. Pada 8 November 2004, responden memfailkan usul ex parte di Mahkamah Tinggi Shah Alam untuk melanjutkan kaveat persendiriannya. Walaupun Mahkamah Tinggi melanjutkan kaveat persendirian itu, setelah pendengaran inter partes pada 20 Jun 2007, permohonan responden untuk melanjutkan kaveat persendirian ditolak. Terkilan, responden merayu ke MR terhadap keputusan itu. Sementara rayuan masih berlanjutan, responden memfailkan suatu usul berikutan s 44 Akta Mahkamah Kehakiman 1964 ('AMK') ke MR untuk tempoh lanjutan sementara kaveat persendirian tersebut sementara menunggu pendengaran rayuan, dan lain-lain relief atau selanjutnya yang mahkamah fikirkan patut. Pada 9 Januari 2008, MR memutuskan bahawa mahkamah tiada kuasa untuk

melanjutkan kaveat persendirian melampaui tempoh statutori enam tahun kerana bercanggah dengan s 328 Kanun Tanah Negara ('KTN') tetapi mahkamah bersedia untuk mempertimbangkan untuk memberikan perintah kaveat pendaftar dan perintah injunksi menghalang perayu daripada membuat apa-apa urusan ke atas tanah tersebut sementara menunggu keputusan guaman KL, tanpa mengambilkira perkara yang sama tidak dipohon dalam usul tersebut. Perayu memperoleh keizinan untuk merayu terhadap keputusan tersebut. Dalam rayuan ini, perayu menghujah bahawa perintah-perintah yang diberikan oleh MR tidak menurut terma-terma usul, yang mana perintah sementara yang dipohon responden hanyalah untuk mengekalkan dan melanjutkan kaveat persendirian responden sehinggalah keputusan muktamad rayuan di MR. Oleh itu, perayu menghujah bahawa MR telah salah menggunapakai s 44 AMK untuk memerintah memasukkan kaveat pendaftar dan untuk memerintah perintah injunksi terhadap perayu. Responden menghujah bahawa MR adalah tepat dalam menggunapakai s 44 AMK bagi mengelakkan prejudis ke atas tuntutan-tuntutan pihak-pihak dan mengekalkan tanah tersebut hinggalah keputusan muktamad pertikaian itu.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Rayuan:

(1) (oleh **Arifin Zakaria HB (Malaya)** dan **Raus Sharif HMP**) Di bawah s 328 KTN, tempoh kaveat persendirian ialah enam tahun dan dalam kes ini, apabila responden gagal memohon untuk melanjutkan kaveat persendiriannya, ia telahpun dilanjutkan sehingga enam tahun. Mahkamah tiada kuasa untuk melanjutkan kaveat persendirian melampaui tempoh enam tahun, yang mana merupakan peruntukan statutori. Walaupun mahkamah mempunyai kuasa untuk mengarahkan pendaftar untuk memasukkan kaveat pendaftar di bawah s 417 KTN, MR secara tak langsung melanjutkan kaveat persendirian melampaui tempoh enam tahun, yang mana dilarang oleh s 328 KTN. Selanjutnya, mahkamah hanya boleh memberi arahan kepada pendaftar jika arahan-arahan tersebut adalah perlu untuk memberi kesan ke atas mana-mana penghakiman atau perintah mahkamah. Tetapi, dalam kes ini, tiada perintah atau penghakiman muktamad bagi MR memberi kesan ke atasnya dan prosedur yang telah dinyatakan dalam ss 319, 320, 321 dan 417 KTN tidak dipatuhi. Maka, perintah MR memasukkan kaveat pendaftar tidak kukuh (lihat perenggan 58–61).

(2) (oleh **Arifin Zakaria HB (Malaya)** dan **Raus Sharif HMP**) Walaupun s 44 AMK memberi kuasa kepada MR untuk membuat apa-apa perintah interim untuk mengelakkan prejudis ke atas tuntutan-tuntutan pihak-pihak sementara menunggu pendengaran 'prosiding' tersebut. Perkataan 'prosiding' mestilah merujuk kepada rayuan yang di hadapan MR, dan hal perkara rayuan di hadapan MR dalam kes ini merupakan perlanjutan kaveat persendirian responden. Oleh itu, apabila MR

mendapati bahawa kaveat persendirian responden tidak boleh dilanjutkan, perkara tersebut harus selesai sebegitu. Perintah-perintah bahawa kaveat pendaftar dimasukkan ke atas tanah tersebut dan juga injunksi menghalang perayu daripada menguruskan tanah tersebut tidak harus dibuat, kerana perintah-perintah tersebut memberikan responden apa yang diinginkannya tanpa rayuannya terhadap keputusan Mahkamah Tinggi didengar. Ini merupakan salah laksana keadilan yang jelas dan s 44 AMK tidak boleh digunapakai untuk memberi perintah-perintah tersebut (lihat perenggan 61–62).

(3) (oleh **Mohd Ghazali HMP,** menentang) Permohonan responden untuk lanjutan sementara kaveat persendiriannya sementara menunggu pendengaran rayuan juga memohon untuk 'such further or other relief or other order as the court deems fit' agar MR boleh bertindak terhadap permohonan tersebut. MR telah melaksanakan kuasanya yang diperuntukkan dalam s 44 AMK dalam memberikan perintah-perintah tersebut kerana kuasa tersebut telah memberikan bidang kuasa semula jadi MR. Mahkamah mempunyai bidang kuasa semula jadi untuk membuat perintah mengarahkan pendaftar untuk memasukkan kaveat pendaftar di bawah s 417 KTN. Jika responden dan HSSB berjaya dalam guaman KL, terdapat kemungkinan bahawa mereka akan mendapat semula tanah tersebut. Oleh itu, atas imbangan kebarangkalian, perintah di bawah s 417 KTN dibuat dengan betul dalam keadaan kes ini. Injunksi menghalang perayu daripada menguruskan tanah tersebut juga harus dikekalkan dengan akujanji biasa terhadap kerugian (lihat perenggan 31, 33, 39 & 40–41).]

Notes

For cases on caveats, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3611–3981.

For cases on Court of Appeal jurisdiction, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4864–4869.

Cases referred to

AR PL Palaniappa Chettiar v PL AR Letchumanan Chettiar & Anor [1982] 1 MLJ 232, HC (refd)

Boonsom Boonyanit v Adorna Porperties Sdn Bhd [1990] 3 MLJ 444; [1990] 2 CLJ 973, HC (refd)

JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor [1987] 1 MLJ 312, HC (refd)

Manilal & Sons (M) Sdn Bhd v Pentadbir Tanah Daerah, Kulim & Anor [1997] 3 MLJ 573; [1998] 1 CLJ 87, CA (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC (refd)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd) [2002] 4 MLJ 113; [2002] 4 CLJ 27, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Soo Bing & Ors v Tan Kooi Fook [1996] 3 MLJ 547, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 44, 96(a)
National Land Code ss 319, 320, 321, 328, 417, 417(1), 418

Appeal from: Criminal Appeal No B-02–540 of 2007 (Court of Appeal, Putrajaya)

Ambiga Sreenevasan (TM Chuah with her) (Azri Chuah & Yap) for the appellant.
Nitin Nadkarni (Raphael Kok and Habeeb Rahman with him) (Lee Hishamuddin Allen & Gledhill) for the respondent.

Mohd Ghazali FCJ (dissenting):

[1] On 16 June 2008 this court granted the appellant leave to appeal against the decision of the Court of Appeal in Civil Appeal No B-02–540 of 2007 on the following questions:

(a) whether as a matter of law the Court of Appeal can pursuant to s 44 of the Courts of Judicature Act 1964, order or direct the land registrar or land administrator to enter a registrar's caveat under s 417 of the National Land Code in the following circumstances:

(i) in the absence of a final judgment or order of the court; and/or

(ii) where the High Court in the subject matter of the appeal had ordered that the respondent's application to reinstate and extend the respondent's private caveat be dismissed with costs; and/or

(iii) where such an order had not been expressly or specifically sought in the written application before the Court of Appeal;

(b) whether as a matter of law the Court of Appeal can make orders under s 44 of the Courts of Judicature Act 1964 which in effect renders the appeal nugatory or academic and/or is made pending the disposal of another suit which is not the subject matter of the appeal; and

(c) whether as a matter of law and justice the Court of Appeal can make such orders as they did on the 9 January 2008 which were not prayed for in the application or in the appeal without affording the respondent before the Court of Appeal the opportunity to show by way of evidence that the orders which included an injunction without an undertaking as to damages ought not to have been granted.

[2] This is an appeal against an interim order. I am in serious doubt as to whether leave should have been granted in the first place as the main suit is still pending in the Kuala Lumpur High Court. Section 44 of the Courts of Judicature Act 1964 ('CJA') reads:

(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

THE BACKGROUND

[3] At all material times, a locally incorporated company named Harta Sekata Sdn Bhd ('HSSB') was the registered proprietor of a piece of land held under HS(D) 114559, PT No 243, Bandar Petaling Jaya, Daerah Petaling, Negeri Selangor ('the said land') which is the subject matter of the dispute.

[4] On 30 March 1998, one Soo Sin Lian @ Su Ken Sin Sat ('SL Soo'), a locally incorporated company named Jupiter Securities Sdn Bhd and HSSB entered into a deed of settlement ('the said deed of settlement'). The said deed of settlement relates to an option agreement dated 15 July 1997 between SL Soo and one Abdul Razak Jalil in respect of 9,2600,000 shares of Mycom Bhd. On the same date, ie, 15 July 1997 SL Soo, Abdul Razak Jalil and a locally incorporated company named Amsteel Securities (M) Sdn Bhd entered into another agreement relating to a block of the Mycom shares. Consequently an arrangement was entered into amongst the same persons wherein HSSB was drawn in. It would seem that HSSB ended up as the purported purchaser of the Mycom shares.

[5] Simultaneously on the same date as the said deed of settlement, ie, 30 March 1998, HSSB as donor granted a power of attorney in favour of SL Soo as donee ('the said P/A') in respect of the said land subject to several terms and conditions including the following:

> 1. To make the necessary application for the approval of the relevant authorities for the assignment, sale, transfer and charge of the Land to the Donee and/or its nominee(s) and/or any other person(s) at the Donee's absolute discretion and to execute as the Donor's act and deed any document deeds, instruments, letters and do all things whatsoever which may be necessary for such purpose.
>
> 3. To sell and dispose the Land at a fair market value, which shall in any event be not less than the average of the forced sale value as valued by two (2) separate valuers, namely Messrs CH Williams Talhar & Wong and Messrs Azmi & Co (price herein shall hereinafter be referred to as 'the Average Price'). In the event that the proposed sale price shall be less than the Average Price, the Donee shall obtain the prior written consent of the Donor before proceeding with the proposed sale.
>
> 6. To enter into vacant possession of the land.

[6] On 10 October 1998 SL Soo, purportedly exercising his powers under the said deed of settlement and the said P/A as attorney for and on behalf of HSSB, entered into a written sale and purchase agreement ('the said S & P agreement') to sell the said land to a locally incorporated company named Taipan Focus Sdn Bhd, the appellant in this instant appeal ('Taipan') for the purchase price of RM23m.

[7] Consequently, on 15 October 1998, Tunku Mudzaffar bin Tunku Mustapha, a director of HSSB and who is the respondent in the instant appeal ('TM'), lodged a private caveat on the said land ('the said private caveat'). The reasons that TM gave in his application for entry of the said private caveat, inter alia, read as follows:

> 2. Alasan-alasan tuntutan saya atas tanah itu ialah —
>
> Saya adalah Pengarah Harta Sekata Sdn Bhd (sepelas ini dirujuk sebagai 'Syarikat tersebut') dan pada 30hb Mac 1998 Syarikat tersebut telah memasuki satu perjanjian dengan Soo Sin Lian @ Su Ken Sin di mana Syarikat tersebut menyerahkan Surat Hakmilik HS(D) 114559, PT 243, Bandar Petaling Jaya kepada Soo bersama Surat Kuasa Wakil untuk memberikan hak menjual tanah tersebut. Pelaksanaan Perjanjian tersebut dan Surat Kuasa Wakil adalah tidak berkuatkuasa dan tak sah terhadap syarikat tersebut kerana ia telah dibuat tanpa balasan dan faedah komersial. Untuk mencegah Su menggunakan Surat Kuasa Wakil untuk menjual tanah, adalah perlu untuk saya sebagai Pengarah Syarikat tersebut memasukkan satu kaveat persendirian untuk melindungi hak syarikat tersebut.

THE KL SUIT

[8] The validity of the said deed of settlement and the said P/A have been challenged in the High Court at Kuala Lumpur vide Civil Suit No S2(S4)–22–739 of 1998 filed on 20 November 1998 ('the KL suit') on the basis that it was a sham sale at an undervalue on one-sided terms and was designed to cheat HSSB. In the KL suit, HSSB as plaintiff prayed for the following reliefs against SL Soo and Taipan, namely:

(a) a declaration and order that the said P/A is voidable and/or unenforceable;

(b) a declaration and order that the said deed of settlement is void and/or unenforceable; and

(c) a declaration and order that the said S & P agreement is void and unenforceable.

The trial of the main suit was still pending when this appeal was heard before this court.

THE SHAH ALAM SUIT

[9] On 16 September 1999, ie, about 10 months after the KL suit was filed, Taipan filed a suit in the Shah Alam High Court (Civil Suit No MT 2–22–1010 of 1999) ('the Shah Alam suit') against SL Soo and HSSB praying for, inter alia, the following reliefs, namely:

(a) specific performance of the said S & P agreement;

(b) the removal of SL Soo's lien-holder's caveat; and

(c) the removal of the said private caveat.

THE CONSENT ORDER

[10] On 31 October 2000, SL Soo, purporting to act on behalf of HSSB, and Taipan entered into a consent order in the Shah Alam suit ('the said consent order') on the following terms, namely:

(a) that the said land be transferred to Taipan;

(b) that SL Soo's lien holder's caveat be removed; and

(c) that the said private caveat be removed.

[11] Consequently, TM intervened in the Shah Alam suit and applied to set aside para 5 of the said consent order; para 5 which relates to the said private caveat lodged by TM reads:

kaveat persendirian yang dimasukkan oleh Tunku Mudzaffar B Tunku Mustapha dan didaftarkan di bawah Kaveat Persendirian No. 29762/98, Jilid 49, Folio 147 dipotongkan, dibatalkan ataupun dikeluarkan oleh Pendaftar Hakmilik dari pejabat pendaftaran hakmilik ataupun dari dokumen hakmilik pejabat pendaftaran untuk Hartanah.

HSSB also intervened and applied to set aside the said consent order. Both TM and HSSB averred that the said consent order was entered into without their knowledge.

[12] On 28 November 2001, the learned judge of the High Court dismissed TM's application in the Shah Alam suit to set aside para 5 of the said consent order. TM appealed to the Court of Appeal (Civil Appeal No B-02–1109 of 2001). On 5 April 2005 the Court of Appeal allowed TM's appeal in the setting aside application and the said private caveat was reinstated.

THE ORIGINATING MOTION

[13] Meanwhile, on 8 November 2004, TM filed an originating motion ex parte (SP No MT1–24–1505 Tahun 2004) in the Shah Alam High Court seeking an order that the said private caveat be reinstated and extended until further order of the court. On 10 November 2004 the learned judge of the High Court ordered that the said private caveat be extended until the inter partes hearing of the originating motion. Taipan and one Fazilah bt Ramzan were allowed to intervene.

[14] On 20 June 2007 the High Court dismissed TM's application to extend the said private caveat. TM appealed to the Court of Appeal. The appeal was registered as Civil Appeal No B-02–540 of 2007.

TM'S NOTICE OF MOTION IN THE COURT OF APPEAL

[15] On 30 November 2007 TM filed a notice of motion ('the said motion') in Civil Appeal No B-02–540 of 2007 pursuant to s 44 of the CJA and or/under the inherent jurisdiction of the court applying for the following reliefs:

(a) an interim order to preserve and extend the said private caveat until the disposal of the appeal, viz, Civil Appeal No B-02–540 of 2007;

(b) that the costs of the application be costs in the cause; and

(c) such further or other relief or other order as the court deems fit.

[16] On 9 January 2008, at the outset of the hearing of the said motion, the Court of Appeal informed counsel that the court has no power to extend the

validity of the said private caveat for more than its validity period of six years but was prepared to consider granting an order for a registrar's caveat and an order for injunction notwithstanding that the same was not prayed for in the motion. After hearing arguments, the court held that in view of the obvious prejudice and the risk of dishonest disposal of the said land by Taipan, it would make the following orders pending the final disposal of the KL suit, namely:

(a) an order directing the Registrar of Titles, Selangor to enter his caveat under s 319 of the National Land Code ('the Code') pursuant to powers exercised under s 417 of the same;

(b) an injunction restraining Taipan or its servants or agents from dealing with or disposing of or having physical possession of the said land;

(c) that the orders are to subsist until final disposal of the KL suit;

(d) that costs be reserved; and

(e) that the hearing of the appeal be adjourned until the final disposal of the KL suit.

[17] Section 319 of the Code provides that a registrar's caveat may be entered by the registrar on the register document of title to any land in any of the circumstances specified in s 320 of the same. Section 320 provides a registrar's caveat may be entered in respect of any land wherever it appears to the registrar to be necessary or desirable, inter alia, for the prevention of fraud or improper dealing. Section 417 of the same provides the court or a judge may by order direct the registrar or any land administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of registrar or land administrator to comply with the order forthwith.

[18] In delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA (as he then was) said:

> Before us two questions arose: first whether the private caveat could be extended and second if the answer to the first question is in the negative, whether any other interim remedy was available to preserve the status quo until the outcome of the appeal herein. Now, it is clear from s 328 of the National Land Code ('the Code') that the life span of a private caveat is six years. The question whether a caveat may be extended beyond the statutory period came up for consideration in *Goh Keng How v Raja Zainal Abidin bin Raja Hussin* [1995] 3 MLJ 6. It was there held (by Abdul Malik Ishak J) that 'Although the High Court has the power to extend the life-span of a private caveat, it should not extend it beyond the six-year life span provided under s 328'. With respect we agree with that statement of the law. In our judgment no court has the power to extend a private caveat in defiance of the express terms of s 328 of the Code. Learned counsel for the appellant appealed to the court's inherent jurisdiction. But it is too well settled that the courts inherent jurisdiction

cannot be exercised in violation of a statutory provision. ... It follows that the first question must receive a negative response.

[19] With regard to the second question, ie, whether any other interim remedy was available to preserve the status quo until the outcome of the appeal herein, the Court of Appeal observed that s 44 of the CJA confers power on the court to make 'any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding'. This is how the Court of Appeal dealt with the second question; Gopal Sri Ram JCA said:

> On this basis, we referred counsel on both sides to the decisions of Chang Min Tat J in *Seet Soh Ngoh v Venkateswara Sdn Bhd & Anor* [1976] 1 MLJ 242 and *Che Dah & Anor v Commissioner of Land Titles (Penang and Malacca) Penang* [1973] 2 MLJ 29 and suggested that the best course in the circumstances might be for us to act under s 417 of the Code and direct the Registrar of Titles to enter his caveat under s 319 of the Code. Learned counsel for the appellant agreed at once that this would be the appropriate order to make. We may add there is nothing extraordinary in the course we took. In *Federal Transport Service Co Ltd & Co v Abdul Malik & Ors* [1973] 1 MLJ 216, Chang Min Tat J was faced at first instance with an application for an injunction which His Lordship considered not to be the appropriate remedy given the circumstances of that case. He however considered some interim protection desirable and went on to appoint a receiver and manager until the outcome of the dispute. This court is, of course, in a much stronger position having regard to the wording of s 44.
>
> Having heard learned counsel for the respondents in reply on the issue of any prejudice to them if we made the order, *we came to the conclusion that having regard to all the circumstances and the justice of the case the entry of a registrar's caveat was the appropriate interim order that this court should make to prevent prejudice. Such a caveat would prevent the transfer of the subject property pending the outcome of the Kuala Lumpur suit*.
>
> Learned counsel for the appellant then addressed us on the other dangers his client faced from the first respondent with regard to the disposal of the subject land and the possession thereof. After hearing arguments from both sides, we concluded that having regard to the justice of the case and the balance of convenience, we should exercise our discretion in favour of the appellant. *An injunction was accordingly granted restraining the first respondent or its servants or agents from dealing with or disposing of the land or having physical possession thereof in any manner whatsoever*. Having regard to fact that the Kuala Lumpur suit had already been fixed for trial in May 2008, we also directed that the substantive appeal herein be heard after the final disposal of that suit. We did that so as to enable both appeals to be taken together rather than in piecemeal. Since the orders made by us were only interim in nature, we directed that they subsist until the final disposal of the Kuala Lumpur Suit. Costs were reserved.
>
> (Emphasis added.)

THE APPEAL BEFORE THIS COURT

Taipan's submission

[20] In canvassing the appeal before this court, learned counsel for Taipan raised the following issues, namely:

(a) that the order granted by the Court of Appeal was not in terms of the said motion;

(b) whether the Court of Appeal can make such an order;

(c) that the injunction was not prayed for.

[21] Counsel then pointed out the following:

(a) that the interim order prayed for by TM is solely an interim order to preserve and extend the said private caveat until the disposal of his appeal in the Court of Appeal and not to preserve the said land or to in any way affect Taipan's rights to the land;

(b) that there was no prayer for an order that the land administrator or land registrar be directed to enter a registrar's caveat or that an injunction order be made against Taipan;

(c) that the orders with regard to the registrar's caveat and the injunction made against Taipan were on the invitation by the Court of Appeal to TM and thereafter upon TM's oral application based on the invitation;

(d) that Taipan was not given an opportunity to provide evidence by affidavit to challenge any such application for the entry of a registrar's caveat or for injunction; and

(e) that the order of the Court of Appeal also renders TM's appeal nugatory.

[22] Counsel then argued that the transaction under the said S & P agreement was pursuant to HSSB, the registered proprietor of the said land, having entered into the said deed of settlement and the said P/A wherein HSSB agreed to grant the power of attorney to SL Soo to sell and dispose the said land in the event that HSSB fail to pay the agreed debts stated therein to SL Soo. Taipan had already obtained the said consent order which, save and except for para 5 therein having been set aside, is still valid and subsisting today. As such, the Court of Appeal order would effectively nullify the effect of the said consent order although the same is not the subject matter of the said motion and TM's appeal. Further, the full trial of the KL suit is still ongoing. The Court of Appeal order would amount to the court making findings of fact or

conclusions on matters that are not directly in issue before the court but which are still in determination in another court.

[23] Counsel then alleged that the various court actions commenced by HSSB and TM against Taipan and/or SL Soo was nothing more than an attempt to avoid compliance with the said deed of settlement and the said P/A and therefore to frustrate the said S & P agreement.

[24] With regard to the Code, counsel submitted as follows:

(a) the discretion and decision whether or not to enter a registrar's caveat under s 320 of the Code lies in the land registrar or the land administrator and not in the court;

(b) that under s 417 of the Code, save and except in a situation of an appeal to the High Court against any decision of the land registrar or land administrator, the court or a judge only has powers to direct the land registrar or land administrator where it is in respect of directing the land registrar or land administrator to do all such things as necessary to give effect to any judgment or order made in any proceedings relating to land; and

(c) there is no judgment or order relating to the said land made by the Court of Appeal in respect of the hearing in connection with the said motion and hence the purported order by the Court of Appeal that a registrar's caveat be entered over the said land is clearly in contradiction to the provisions of ss 320 and 417 of the Code.

[25] Counsel pointed out that there was also no question of undertaking on damages being made by TM, who is merely a director of HSSB and has no personal interest in the said land, in respect of the order for injunction. She concluded that TM has no locus standi or personal right of action against Taipan to justify the granting of an injunction or the ordering of the entry of a registrar's caveat in favour of TM against Taipan.

TM's submission

[26] In opposing the appeal, learned counsel for TM pointed out the following factors show the risk of serious prejudice should this court allow the appeal, namely:

(a) the question of the true legal ownership of the said land is still the subject-matter of the on going trial in the KL suit;

(b) there is a substantial risk that the said land would be dishonestly disposed of by Taipan as can be seen from the 'previous mischievous attempt' by Taipan and SL Soo to transfer the said land without giving notice to HSSB or TM;

(c) as the said land forms the subject matter of the KL suit, preservation of the status quo is important so as to prevent the KL suit from becoming nugatory; and

(d) if the status quo is not preserved, HSSB faces the risks of losing the said land forever and thus suffer irremediable and incalculable losses even if it later succeeds in its claim in the KL suit.

[27] With regard to the said S & P agreement, counsel argued that it 'was not made at arms's-length and/or was a sham agreement'. He then pointed out the following:

(a) there is no completion date for the second payment of the purchase consideration price of RM20,699,000;

(b) in cl 2 and cl 3.1 of the agreement, it can be seen that payment of the sum of RM1,000 being the deposit of the purchase consideration appears to be odd;

(c) SL Soo, in agreeing to the mode of payment in cl 2 and cl 3.1 on behalf of HSSB did not appear to obtain the best bargain for HSSB for the following reasons:

(i) it can be inferred that the agreement was not intended to be binding on both parties until the conditions have been fulfilled;

(ii) if the purchaser, ie, Taipan commits a breach of agreement by refusing or failing to pay the first payment under cl 3.1 within the time stipulated after the conditions have been fulfilled, the vendor will only have RM1,000 in his hand to forfeit in the event the vendor chooses to terminate the agreement; of course, it is open to the vendor to sue for damages for the breach on the part of the purchaser, but having to sue rather than forfeiting 10% of purchase price, is unusual and a disadvantage;

(iii) although, under cl 4.2, the said land is to be free from encumbrances within 30 days from the date of agreement, there is no time period for the approval of the state authority to be obtained, thus giving perpetuity and also uncertainty as to the subsistence or validity of the agreement and the time for completion; this is not normal in that a time period ought to be stipulated for any condition to be fulfilled by any party or for any approval to be obtained, so that if the condition cannot be fulfilled or the approval cannot be obtained on expiry of the time period,

then either party may choose to opt out of the transaction; in the instant case, if the approval of the state authority is not obtained after ten years, it would appear that the agreement will remain to be valid and subsisting; during this time, if someone offers the vendor an amount that is double the purchase price, it would appear that there is nothing much that the vendor can do to get itself out of the bargain;

(d) the provision for payment of the balance purchase price (referred to as the 'second payment' in cl 3.2) is very unusual; although payment by way of residential units/commercial units/space ('SSL's units') is not unheard of, what is most unusual are the following facts:

(i) the obligation of the purchaser to deliver or transfer or assign the SSL's units to the vendor is not secured in any way whatsoever; normally, a bank guarantee or at least a third party guarantee by a reliable person or body will be in place to secure such an obligation;

(ii) there is no time period fixed for the purchaser to commence the intended development or to deliver or transfer or assign the SSL's units; if the purchaser does not commence the development at all, then there will be no SSL's units to deliver;

(iii) under cl 9.1, it is intended that the said land shall be transferred to the purchaser when the approval of the state authority has been obtained and before the second payment is made; this will leave the vendor to face the unacceptable risk that the SSL's units may never be delivered or transferred to the vendor;

(iv) further, under cl 6, immediate possession is given to the purchaser;

(e) the vulnerable position of the vendor as explained above generally does not conform to normal conveyancing practice in a transaction of such nature; thus, this gives rise to an inference that the entire bargain may not have been entered into at arm's length.

[28] Counsel then highlighted that one of the issues in the KL suit is that the purchase consideration of RM23m under the said S & P agreement is a substantial undervalue, as its true value is around RM84m. He also pointed out that HSSB is claiming that SL Soo lacked the authority to enter into the said S & P agreement. He further added that development works that are being carried out on the said land by Taipan is illegal.

JUDGMENT

[29] This is an appeal against an interim order. The orders made by the

Court of Appeal are purely interim in nature. Basically, this instant appeal concerns a complaint that the orders granted were not prayed for.

[30] The Court of Appeal acted under s 44 of the CJA (reproduced earlier). It is clear from a plain reading of the section that the Court of Appeal has wide discretionary powers to prevent prejudice to the claim of the parties pending an appeal. The main complaint canvassed by counsel for Taipan is that the orders made were not prayed for. She pointed out that TM had only applied for an interim order to preserve and extend the said private caveat until the disposal of the appeal.

[31] In my judgment, there is no merit in Taipan's argument because the motion also asked for 'such further or other relief or other order as the Court deems fit'. That prayer is not for show. The Court of Appeal is clearly entitled to act on that prayer.

[32] It suffices if I quote one authority in support. In *JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312, a defendant's application did not contain a prayer for stay of proceedings and hence it was argued that the court should not consider the question of stay. Prayer 4 of that application were couched in the following words, namely, 'such further or other orders or directions be made or given as this Honourable Court deems fit'. In his judgment, Zakaria Yatim J (as he then was) said (at p 313):

> I think prayer 4 is wide enough to enable the court to grant the stay. In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, Salleh Abas FCJ as he then was, in delivering the judgment of the Federal Court said, at p 160:
>
> > We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors ... In any case prayer (e) in para (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for 'loss of earning' in para 5(a) should entitle the court to make such an assessment ...

[33] I am of the view that the Court of Appeal has correctly exercised its power provided under s 44 of the CJA in granting the said orders. That power confers original jurisdiction on the Court of Appeal. In *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113; [2002] 4 CLJ 27, in delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA (as he then was) had occasion to deal with, inter alia, s 44 of the CJA. This was what he said (at p 120 (MLJ); pp 34–35 (CLJ)):

Now, it is significant that the section is markedly different from s 73. The latter is much narrower. It is confined entirely to applications to stay execution upon a judgment. *By contrast, s 44 is far wider. It empowers this court to make interim orders to preserve the integrity of an appeal or other proceeding, including the very application under the section itself* (see sub-s 2). Such interim preservation orders may take the form of an injunction or other relief designed — in the words of the section — 'to prevent prejudice to the claims of parties'. Further, s 44, unlike s 73, does not confer concurrent jurisdiction on the High Court and this court. *It confers original jurisdiction on this court*. Hence s 43 does not apply and there is no requirement that a separate application to the High Court be made before a litigant may invoke the s 44 jurisdiction of this court. In other words, s 44 is not to be read as being subject to s 43.

However, this court has on several occasions treated s 44 as governing applications for a stay of execution. See, *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598; [1997] 2 CLJ 299; *Penang Port Commission v Kanawagi s/o Seperumaniam* [1996] 3 MLJ 427; [1997] 1 CLJ 423; *Penang Port Commission lwn Kanawangi a/l Seperumaniam* [1997] 2 MLJ 300; [1997] 1 CLJ 434; *Jurutera Consultant (SEA) Sdn Bhd & Ors v Eddie Lee Kim Tak & Ors* [1999] 1 CLJ 564. Having carefully considered the relevant statutory provisions, my learned brothers and I have come to the conclusion that this is an unnecessarily restrictive view of s 44 in the absence of any express or implied limitation imposed by the language employed by Parliament. Further, it is most unlikely that Parliament would have enacted two provisions governing the stay of execution. And if Parliament intended the s 44 jurisdiction to be concurrently exercisable by this court and the High Court, it would have said so. Accordingly it is our view that an application to this court under s 44 which is not in the nature of an application application for a stay of execution may be made without the necessity of complying with s 43 of the Act.

(Emphasis added.)

(Note:

Section 43 of the CJA: Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

Section 73 of the CJA: An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.)

[34] Section 417 of the Code, which deal with the general authority of the court, reads:

(1) The court or a Judge may by order direct the registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the registrar or Land Administrator to comply with the order forthwith.

(2) Where, pursuant to any order made by virtue of this section, the registrar or any Land Administrator —

(a) cancels any instrument relating to land, or any memorial or other entry on any such instrument, or

(b) makes any other amendment of, or addition to, any such instrument,

he shall note thereon the reason for the cancellation, amendment or addition, and the date thereof, and shall authenticate the same by his signature and seal.

(3) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

[35] In *Manilal & Sons (M) Sdn Bhd v Pentadbir Tanah Daerah, Kulim & Anor* [1997] 3 MLJ 573; [1998] 1 CLJ 87 the Court of Appeal had occasion to deal with s 417 of the Code. In his judgment, Mohd Noor Ahmad J (as he then was) said (at p 603 (MLJ); p 121 (CLJ)):

What is in issue here is whether the rectification can be done through the machinery of sub-s (1) of s 417 of the NLC which the appellant had adopted.

The subsection reads:

> The court or a judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to *any judgment or order given or made in any proceedings* relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith. (Emphasis added.)

The subsection empowers the court or a judge to direct the registrar to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land and it is incumbent upon him to comply with the order forthwith. From established authorities, as highlighted in the judgment of Siti Norma Yaakob JCA, the extent of the operation of the section is of limited application only. It does not empower the court to allow a defective or void private caveat to be amended by caveator and it does not authorise the court to make an order or direction contrary to the NLC itself, that is to say, it does not authorise the court to direct the registrar to make an entry inconsistent with the scheme of the NLC. Although the subsection does not set out the terms on which a court action can be taken, it confirms the inherent or general jurisdiction of the court over the registrar or land administrator.

My view is that the expression 'any judgment or order given or made in any proceedings' appearing in the subsection is not confined only to a judgment or order given or made in the impugned proceeding but also includes any existing valid order of the court made in previous proceedings relating to the same lands. The subsection should be given a

liberal interpretation so that the exercise of the inherent or general powers of the court over the registrar will be more meaningful in order to ensure that the registrar really complies with the provisions of the NLC.

(Emphasis added.)

[36] Section 319 of the Code provides that a 'Registrar's caveat' may be entered by the registrar on the register document of title to any land in any of the circumstances specified in s 320. Section 320 of the Code provides that a registrar's caveat may be entered in respect of any land wherever such appears to the registrar to be necessary or desirable, inter alia, for the prevention of fraud or improper dealing. In *AR PL Palaniappa Chettiar v PL AR Letchumanan Chettiar & Anor* [1982] 1 MLJ 232 it was held that the High Court has the power to order the registrar to enter a registrar's caveat to prevent fraud or improper dealings in land, whether or not the registrar is a party to the proceedings. The learned JC said (at p 234):

> In considering the question, I was requested by counsel to consider the judgment of Chang Min Tat J (as he then was) in the *Seet Soh Ngoh* case. The learned judge held in that case that the court had the power to order the registrar, since he was before the court, to enter a registrar's caveat to prevent the fraud and improper dealing. With respect, I am in agreement with the decision of the learned judge. I would go further to consider (whether or not the registrar is a party to the proceedings before the court) the question whether the court has the power to order him to enter his caveat under the provisions of s 417(1) of the Code, reading as follows:
>
> > 417(1) The court or a judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith.
>
> In my judgment, the provisions of s 417(1) are clear and unambiguous. It vests the power in the High Court to direct by order the registrar to carry out or give effect to any judgment or order given or made in any proceedings relating to land.

[37] In *Boonsom Boonyanit v Adorna Porperties Sdn Bhd* [1990] 3 MLJ 444; [1990] 2 CLJ 973, the High Court held that the court has the power to order the registrar to enter the registrar's caveat under s 417(1) of the Code notwithstanding the fact that the registrar was not made a party to the application. Mohamed Dzaiddin J (as he then was) said (at p 447 (MLJ); p 977 (CLJ)):

> In my opinion, notwithstanding the Registrar of Titles is not a party to this application, the court has power to order the registrar to enter the registrar's caveat under s 417(1) of the Code which reads as follows:

> The court or a judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith.

Encik Chan referred me to the decision of Wong Kim Fatt JC in *AR PL Palaniappa Chettiar*'s case where it was held that the High Court has the power under s 417(1) to order the registrar to enter the registrar's caveat under s 320 to prevent fraud or improper dealing whether or not the registrar is a party to the proceedings. Having considered the reasoned judgment of the learned judicial commissioner, I need only say that I am in complete agreement with his decision and adopt the same in this present application. However, what I need to emphasise here is simply that s 417 empowers the court to direct by order the registrar to do all such things as may be necessary to give effect to the court's order or judgment which included ordering the registrar to enter his registrar caveat under s 320. In the instant case, after a proper scrutiny of the subsequent affidavits of Mr Bill Saw (lampiran 11) and the applicant (lampiran 12) and the writ and the statement of claim, I am satisfied that in the circumstances of the whole case the registrar's caveat is necessary to be entered to prevent fraud or improper dealing in respect of the said land and should remain until the final determination of the dispute in Civil Suit No 22–401 of 1989.

[38] In the recent case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, this court had the occasion to make a similar order, viz, directing the registrar of titles to enter a registrar's caveat in the exercise of powers conferred by s 417 of the Code. The facts and the reasons for making the order can be gleaned from the first paragraph of the judgment of Gopal Sri Ram FCJ and it reads:

> This court by its judgment dated 16 October 2009 found for the appellant on the basis that she is the beneficiary under a constructive trust of which the second respondent is trustee. The subject matter of the trust is the property referred to in that judgment. Argument was sought from counsel as to the nature of the specific relief that should be granted having regard to the facts of this case and also as to the type of costs order that should be made. Evidence was filed by both sides as to the present state of affairs. It emerged, undisputed, that the second respondent had sold the subject property to a third party and that the instrument of transfer had been presented for registration. To prevent any further fraud and for the purpose of preserving the subject property in specie, on 27 October 2009 we directed the registrar of titles to enter his caveat pursuant to s 320 read with s 321 of the National Land Code. We did so in the exercise of the powers conferred by s 417 of the National Land Code. It is settled that this court has ample jurisdiction to make consequential orders to give effect to its judgment (see *Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547) including directing the entry of a registrar's caveat (see *Seet Soh Ngoh v Venkateswara Sdn Bhd & Anor* [1976] 1 MLJ 242) and to ensure that its judgment in particular cases is not defeated by intervening events.

[39] I am of the view that the Court of Appeal clearly has originating jurisdiction to make an order directing the registrar to enter a registrar's caveat under s 417 of the Code. In *Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547, which was referred to by learned counsel for Taipan, this court held that the court had no jurisdiction to order a registrar's caveat to be entered. In that case, it was held that the words 'any judgment or order' in s 417(1) meant that there must be a final judgment or order of the court before the jurisdiction could be exercised. However, in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177, with regard to the distinction between the terms 'judgment' and 'order' appearing in s 96(a) of the CJA, this court concluded that a 'judgment' is a 'final determination of the rights of parties' while 'order' refers to 'an interlocutory order made in relation to the judgment'. In delivering the judgment of this court, Augustine Paul FCJ said (at p 130 (MLJ); pp 202–203 (CLJ)):

> It is necessary to ascertain the meaning of the words 'judgment', 'order' and 'any' in s 96(a) in order to appreciate its proper scope. In commenting on the relationship between the words 'judgment' and 'order' Cotton LJ said in *Ex parte Chinery* (1884) 12 QBD 342 at p 345:
>
> > Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order'. No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct.
>
> *Black's Law Dictionary*, 6th Ed defines a 'judgment' as:
>
> > The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding. *Towley v. King Arthur Rings*, Inc., 40 NY 2d 129, 386 NYS 2d 80, 351 NE 2d 728, 730.
>
> Ramanatha Aiyar's *Advanced Law Lexicon* 3rd Ed defines an 'order' as:
>
> > An order is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some point collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution of the final judgment.
>
> A judgment is therefore a final determination of the rights of parties while an order is an interlocutory order made in relation to the judgment.

[40] In respect of the instant appeal, I would agree with the Court of Appeal that if TM and HSSB were to succeed at the trial of the KL suit, there is a possibility that they would not be able to get back the said land and hence would suffer loss which would be difficult to quantify. On the balance of convenience, the said order under s 417 of the Code was properly made under the circumstance of the case.

[41] In view of the above authorities, it is my judgment that the instant appeal is without merits and should be dismissed with costs. With regard to the possession order made by the Court of Appeal, learned counsel for TM conceded that that order should not be made. That being the position, I would order that the possession order be set aside. The injunction order restraining Taipan or its servants or agents from dealing with or disposing of the said land would remain with the usual undertaking as to damages given by counsel for TM on behalf of his client.

[42] By reason of the view I have expressed in this judgment, I find it unnecessary to answer the questions posed.

Raus Sharif FCJ:

[43] This is an appeal by Taipan Focus Sdn Bhd ('Taipan') against the decision of the Court of Appeal given on 9 January 2008. This court had on 16 June 2008 granted Taipan leave to appeal on the following questions.

(a) whether as a matter of law the Court of Appeal can pursuant to s 44 of the Courts of Judicature Act 1964, order or direct the land registrar or land administrator to enter a registrar's caveat under s 417 of the National Land Code in the following circumstances:

  (i) in the absence of a final judgment or order of the court; and/or

  (ii) where the High Court in the subject matter of the appeal had ordered the respondent's application to reinstate and extent the respondent's private caveat be dismissed with costs; and/or

  (iii) where such an order had not been expressly or specifically sought in the written application before the Court of Appeal;

(b) whether as a matter of law the Court of Appeal can make orders under s 44 of the Courts of Judicature Act 1964 which in effect renders the appeal nugatory or academic and/or is made pending the disposal of another suit which is not the subject matter of the appeal; and

(c) whether as a matter of law and justice the Court of Appeal can make such orders as they did on 9 January 2008 which were not prayed for in the application or in the appeal without affording the respondent before the

Court of Appeal the opportunity to show by way of evidence that the orders which included an injunction without an undertaking as to damages ought not to have been given.

[44] The dispute in this case is over a piece of land held under HS(D) No 114559, PT No 243, Bandar Petaling Jaya, Daerah Petaling Jaya, Selangor Darul Ehsan ('the said land'). At the material time the registered proprietor of the said land was Harta Sekata Sdn Bhd ('Harta Sekata').

[45] On 30 March 1998, Harta Sekata entered into a deed of settlement with one Soo Sin Lian @ Su Ken Sin ('Peter Soo') and Jupiter Securities Sdn Bhd ('deed of settlement'). On the same date, Harta Sekata also executed a power of attorney in favour of Peter Soo in respect of the said land subject to, inter alia, the following terms:

(a) To make the necessary application for the approval of the relevant authorities for the assignment, sale, transfer and charge of the land to the donee and/or its nominee(s) and/or any other person(s) at the donee's absolute discretion and to execute as the donor's act and deed any document deeds, instruments, letters and do all things whatsoever which may be necessary for such purpose.

(b) To sell and dispose the land at a fair market value, which shall in any event be not less than the average of the forced sale value as valued by two separate valuers, namely Messrs CH Williams Talhar & Wong and Messrs Azmi & Co (price herein shall hereinafter be referred to as 'the average price'). In the event that the proposed sale price shall be less than the average price, the donee shall obtain the prior written consent of the donor before proceeding with the proposed sale.

(c) To enter into vacant possession of the land.

[46] On 10 October 1998, Peter Soo purportedly in the exercise of his powers under the deed of settlement and power of attorney, entered into a sale and purchase agreement to sell the said land to Taipan for a purchase price of RM23,000,000 ('the sale and purchase agreement').

[47] Harta Sekata disputed the sale and challenged the validity of the deed of settlement and power of attorney. On 20 November 1998, Harta Sekata filed the Kuala Lumpur Civil Suit S2(S4)–22–739 of 1998 ('KL suit') against Taipan and Peter Soo seeking the following relief:

(a) a declaration and order that the power of attorney is voidable and/or unenforceable;

(b) a declaration and order that the deed of settlement is void and/or unenforceable; and

(c) a declaration and order that the sale and purchase agreement is void and unenforceable.

Arising from the KL Suit, Tunku Mudzaffar bin Tunku Mustapha ('TM)', the Director of Harta Sekata, lodged a private caveat on the said land to restrain any dealing on the said land pending the outcome of the KL suit.

[48] On 16 September 1999, Taipan filed at Shah Alam High Court a Civil Suit No MT3–(MT2)–22–1010 of 1999 ('the Shah Alam suit') against Peter Soo and Harta Sekata praying for amongst others, specific performance of the sale and purchase agreement and the removal of TM's private caveat. About a year later, ie on 31 October 2000, Peter Soo, purporting to act on behalf of Harta Sekata and Taipan, entered into a consent order in the Shah Alam suit, which provides amongst others for the said land to be transferred to Taipan and TM's private caveat be removed.

[49] On 17 August 2001, TM filed an application to intervene in the Shah Alam suit and applied to set aside para 5 of the consent order. Paragraph 5 refers to the order which removed TM's private caveat on the said land. Harta Sekata also applied to set aside the consent order. Both TM and Harta Sekata averred that the consent order was entered into without their knowledge.

[50] On 28 November 2001, the learned High Court judge at Shah Alam dismissed TM's application. TM appealed to the Court of Appeal. On 5 April 2005, the Court of Appeal allowed TM's appeal and thus the TM's private caveat was reinstated.

[51] On 8 November 2004, TM filed an originating summons (ex parte) in the Shah Alam High Court seeking to extend the private caveat. On 10 November 2004, the Shah Alam High Court granted the ex parte order extending the private caveat. However, on 20 June 2007, the High Court after an inter partes hearing, dismissed TM's application to extend the private caveat.

[52] Aggrieved, TM appealed to the Court of Appeal against the High Court's decision. While the appeal was still pending, TM filed a notice of motion ('motion') before the Court of Appeal for an interim extension of the private caveat pending the hearing of the appeal. Two questions arose before the Court of Appeal. First, whether the private caveat could be extended. Second, if the answer to the first question is in the negative, whether any other interim remedy was available to preserve the status quo until the outcome of the appeal therein.

[53] On 9 January 2008, the Court of Appeal held that it has no power to extend the private caveat beyond the statutory period of six years as it would be

contrary to s 328 of the National Land Code ('Code'). However, the Court of Appeal relying on s 44 of the Courts of Judicature Act 1964 ('CJA') made the following orders:

(a) an order directing the Registrar of Titles, Selangor, to enter his caveat under s 319 of the Code;

(b) an injunction restraining Taipan or its servants or agents from dealing with or disposing of or having physical possession of the said land;

(c) the hearing of the appeal be adjourned until the final disposal of the KL suit.

[54] The main issue in this appeal is whether the Court of Appeal was right in invoking s 44 of the CJA when granting the orders as it did on 9 January 2008. For ease of reference s 44 of the CJA is hereby reproduced:

> 44(1) In any proceeding pending before the Court of Appeal any direction incidental thereto, not involving the decision of the proceeding, (any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding), any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered, may at any time be made by a Judge of the Court of Appeal.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
>
> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[55] The Court of Appeal found that s 44 of the CJA confers power upon the court to make 'any interim order to prevent prejudice to the claims of parties pending the hearing of the proceedings'. The Court of Appeal concluded that 'having regard to all circumstances and justice of the case' the entry of a registrar's caveat was the appropriate interim order that it should make to prevent prejudice. This would prevent the transfer of the said land pending the outcome of the KL suit.

[56] The Court of Appeal also addressed on the other dangers faced by Harta Sekata with regard to the disposal of the subject land and the possession thereof. Thus, after hearing the parties the Court of Appeal granted an injunction in favour of TM. The injunction was to restrain Taipan or its servants or agents from dealing with or disposing of the land or having physical possession thereof in any manner whatsoever.

[57] In the appeal before us, learned counsel for Taipan submitted that the orders granted by the Court of Appeal was not in terms of the motion. It was pointed out that the interim order prayed for by TM was solely to preserve and extend TM's private caveat until the disposal of the appeal in the Court of Appeal. There was no prayer for an order that the land administrator or the registrar be directed to enter a registrar's caveat or that an injunction order be made against Taipan. Thus, it was submitted that s 44 of the CJA was wrongly invoked by the Court of Appeal. Learned counsel for TM on the other hand strongly argued that the Court of Appeal was right in invoking s 44 of the CJA in order to prevent prejudice to the claims of the parties as well as to preserve the subject land until the outcome of the dispute.

[58] With utmost respect, I am unable to agree with the decision and reasoning of the Court of Appeal. It is clear in this case that at the time of the application to extend the TM's private caveat was made, TM's private caveat had already been extended up to six years. Under s 328 of the Code, the life span of a private caveat is six years. It is a statutory provision and thus the court has no power to extend a private caveat beyond the six-year life-span. Thus, it is my respectful view that the Court of Appeal after having come to the conclusion that the extension of the private caveat was out of the question should not have directed the registrar to enter a registrar's caveat on the said land instead. By ordering a registrar's caveat, the Court of Appeal was indirectly extending the TM's private caveat beyond six years which is prohibited by s 328 of the Code.

[59] The court's power to direct the registrar to enter a registrar's caveat is provided for under s 417 of the Code. It reads as follows:

> (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.
>
> (2) Where, pursuant to any order made by virtue of this section, the Registrar or any Land Administrator —
>
> (a) cancels any instrument relating to land, or any memorial or other entry on any such instrument, or
>
> (b) makes any other amendment of, or addition to, any such instrument,
>
> (3) Where the Registrar of Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

[60] The Federal Court in the case of *Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547 had occasioned to deal on the issue whether the court had the power or jurisdiction to direct the registrar or any land administrator to enter a registrar's caveat in respect of any land. It was held that under ss 319, 320 and 321 of the Code, a person who desires to have a registrar's caveat entered in respect of any land must apply to the registrar. If the registrar refused his application, his remedy is to appeal to the court against such refusal under s 418 of the Code. The court can only direct the registrar to enter the registrar's caveat if the court does not agree with the decision of the registrar when exercising the appellate jurisdiction under s 418 of the Code. It was also held that the words '… be necessary to give effect to any judgment or order given or made in any proceeding' in s 417(1) of the Code, has the effect of limiting the power of the court to give directions to the registrar. It means that the court can only give directions to the registrar if such directions are necessary to give effect to any judgment or order of the court.

[61] I am in complete agreement with the above decision and adopt the same in the present appeal. Thus, in the circumstances of this case, the order of the Court of Appeal that the registrar's caveat be entered on the said land cannot be supported. This is because firstly, the procedure as laid down by ss 319, 320, 321 and 417 of the Code was not followed. Secondly, there was no final judgment or order on the said land for the Court of Appeal to give effect to. In the present case, the only order applied for by TM was an interim order to preserve and extend TM's private caveat until the disposal of the appeal. Thus, once the Court of Appeal found that TM's private caveat could not be extended, the matter should have ended there. The orders that a registrar's caveat be entered on the said land as well as an injunction restraining Taipan or its servants or agents from dealing with or disposing of or having physical possession of the said land should not have been made. Section 44 of the CJA cannot be invoked to grant those orders.

[62] No doubt s 44 of the CJA confers power upon the Court of Appeal to make any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding. But, I am of the view that the word 'proceeding' must refer to the appeal pending before the Court of Appeal. And the subject matter of the appeal pending before the Court of Appeal is the extension of TM's private caveat. Thus, as said earlier, once the Court of Appeal found that TM's private caveat could not be extended, I could not see how s 44 of the CJA could be invoked for the Court of Appeal to grant the orders as it did on 9 January 2008. By making the orders as it did, the Court of Appeal effectively granted what TM wanted, ie to restrain Taipan from dealing with the said land having earlier held that it had no power to extend the private caveat. In other

words, TM got what he wanted without his appeal against the decision of the Shah Alam being heard by the Court of Appeal. This is a clear miscarriage of justice.

[63] For the reasons given above, my answers to the three questions posed are in the negative. This appeal must be allowed with costs here and below. The orders of the Court of Appeal are hereby set aside. In the circumstances, I would direct that an early date be fixed for the hearing of TM's appeal by the Court of Appeal.

[64] My learned brother Arifin Zakaria CJ (Malaya) has seen this judgment in draft and has expressed his agreement with it.

Appeal allowed with costs here and below.

Reported by Kohila Nesan